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# In the Supreme Court of the United States

VIRGINIE GSCHWIND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind,

*Petitioner*,

v.

THE CESSNA AIRCRAFT COMPANY, ET AL.,

*Respondents*.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## RESPONDENT CESSNA AIRCRAFT COMPANY'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

In 1993, petitioner's husband was killed when the airplane he was flying crashed in France. Petitioner sued respondents – The Cessna Aircraft Company, the manufacturer of the airplane, and Pratt & Whitney Canada, the manufacturer of the airplane's engine – in Ohio state court. Respondents removed the case to federal court and then moved to dismiss for *forum non conveniens*. Cessna also moved to transfer the case to the District of Kansas. After the case had been transferred to Kansas, the district court there dismissed for *forum non conveniens*. Petitioner appealed, and the Tenth Circuit affirmed. Petitioner filed a petition for writ of certiorari, which was denied.

Petitioner then returned to the District of Kansas, moving to vacate the district court's dismissal as void. The district court denied the motion. Petitioner appealed, and the Tenth Circuit affirmed.

The question presented here is:

Does Fed. R. Civ. P. 60(b)(4) require a federal court to permit collateral attack on a final judgment of dismissal for *forum non conveniens* brought by a party contending that complete diversity of citizenship was lacking in the prior proceeding?

## PARTIES TO THE PROCEEDING

Respondents are The Cessna Aircraft Company and Pratt & Whitney Canada, Inc.

## RULE 29.6 STATEMENT

The Cessna Aircraft Company is a wholly owned subsidiary of Textron Inc.

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# In the Supreme Court of the United States

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VIRGINIE GSCHWND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind,

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THE CESSNA AIRCRAFT COMPANY, ET AL.,

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## RESPONDENT CESSNA AIRCRAFT COMPANY'S BRIEF IN OPPOSITION

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Respondent The Cessna Aircraft Company respectfully urges the Court to deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit's unanimous decision does not conflict with decisions of other circuits, is fully consistent with the decisions of this Court, and does not otherwise raise important constitutional or federal questions warranting this Court's review.

## OPINIONS BELOW

The opinion of the Tenth Circuit for which petitioner seeks review (Pet. App. 1a-9a) is reported at 232 F.3d 1342.

The memorandum and order of the United States District Court for the District of Kansas denying petitioner's motion to vacate pursuant to Fed. R. Civ. P. 60(b)(4) is reported at 189 F.R.D. 643. (Pet. App. 10a-19a).

## STATEMENT OF THE CASE

### A. Background

This case arises from an airplane accident. On August 16, 1993, Cyril Gschwind was killed when the airplane he was flying crashed in southern France. Mr. Gschwind was a French citizen living in Belgium. Nearly two years after the accident, his widow, Petitioner Virginie Gschwind, who is a citizen of Belgium, filed a wrongful death suit in the Court of Common Pleas for Montgomery County, Ohio, against The Cessna Aircraft Company, Pratt & Whitney Canada, and Hartzell Propeller, Inc. Respondents removed the case to the United States District Court for the Southern District of Ohio. Petitioner moved to remand, arguing that although complete diversity of citizenship among other parties supported federal jurisdiction, Hartzell Propeller's presence as a resident Ohio corporation precluded removal under 28 U.S.C. § 1441(b). When Hartzell was later dismissed (the district court having ascertained that the airplane's propeller had been manufactured by Cessna, not Hartzell), the sole basis for petitioners' motion to remand disappeared, prompting the district court to deny it as moot. Petitioner did not seek interlocutory review of this decision. Pet. App. 10a-11a.

While the federal court in Ohio was assessing whether Hartzell was a proper party, Cessna moved to dismiss for *forum non conveniens* or to transfer to the District of Kansas pursuant to 28 U.S.C. § 1404(a). Pratt & Whitney Canada moved to dismiss for lack of personal jurisdiction or for *forum non conveniens*. The United States Magistrate Judge recommended denying the motions to dismiss, but granted Cessna's motion to transfer. Respondents lodged

timely objections to the Magistrate's recommendations on the motions to dismiss. Pet. App. 10a-11a.

After the transfer to Kansas, the district judge there accepted supplemental briefs on the *forum non conveniens* motions and several months later granted them. The case was not "conditionally dismissed," as petitioner suggests. Pet. App. 3a. The district court required that respondents agree to produce documents and witnesses for discovery in France, to waive any limitations defenses applicable there, and to transport physical evidence to France. To comply with these requirements, Cessna submitted an affidavit in which it agreed to absorb certain costs and waive certain defenses to assure that petitioner suffered no unfair prejudice from the dismissal. The district court also required that respondents agree to have the case reinstated in Kansas should the French courts refuse jurisdiction. It imposed these safeguards to secure an adequate alternative forum in France for petitioner, and failing that, to assure a forum for her here. Respondents agreed to comply with these conditions, and a judgment dismissing the case was entered shortly thereafter. *Id.* at 11a.

**B. The First Appeal and First Petition for Certiorari**

Petitioner appealed to the Tenth Circuit, challenging only the district court's rationale for dismissal under *forum non conveniens*. The statement of jurisdiction in her opening brief said that the court of appeals had jurisdiction under 28 U.S.C. § 1291 to review the final judgment dismissing the case. It also stated that the district court's jurisdiction rested on 28 U.S.C. § 1332. Petitioner did not question the existence of diversity jurisdiction or subject-matter jurisdiction in her opening brief, her reply, or during oral argument. Not until after the Tenth Circuit had unanimously affirmed the district court's dismissal, *see Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602 (10th Cir. 1998), did petitioner suggest (in a petition for rehearing) that the district court lacked subject-

matter jurisdiction. The Tenth Circuit panel denied the petition without comment. Pet. App. at 2a, 11a.

Petitioner then filed a petition for writ of certiorari, in which she again challenged subject-matter jurisdiction, claiming that because the parties were not completely diverse under the prevailing interpretation of 28 U.S.C. § 1332(a)(2), the district court lacked jurisdiction to dismiss her case for *forum non conveniens*. This Court denied certiorari. 526 U.S. 1112 (1999).

### C. The Post-Judgment Motion to Vacate

On July 23, 1999, petitioner returned to Kansas, filing with the district court a motion to vacate the court's judgment of dismissal as void, pursuant to Fed. R. Civ. P. 60(b)(4). Petitioner argued that, because the district court lacked subject-matter jurisdiction when it dismissed for *forum non conveniens*, the prior final judgment was void and the case should be remanded to Ohio state court. Pet. App. 12a.

The district court denied the motion, applying the long-established rule that a litigant is barred by res judicata from making a collateral attack on a final judgment, even when the attack challenges the court's subject-matter jurisdiction. *Id.* at 16a. It noted that its judgment of dismissal was undisturbed by the Tenth Circuit or by this Court and was, therefore, final and not subject to further appeal. *Id.* Because petitioner's motion to vacate was lodged after a final affirmed judgment, rather than after remand or other disposition by the court of appeals, the district court rejected as distinguishable the cases petitioner cited. *Id.* at 17a. Unlike those cases, in which the motions to vacate were direct attacks in non-final ongoing cases, the district court found that petitioner's motion amounted to a collateral attack. *Id.* And while recognizing the inherent tension between procedural safeguards against the erroneous exercise of federal jurisdiction and the need for finality, the district court found finality the more compelling goal. *Id.* at 13a.

The district court held that Fed. R. Civ. P. 60(b)(4) is to be narrowly construed, and, in evaluating the circumstances that might warrant relief, made the important distinction between merely erroneous judgments, which do not warrant relief, and void judgments, which do. Pet. App. 12a. Without deciding whether it had erred in exercising subject-matter jurisdiction, the district court said that had it erred, the error would not have justified granting post-judgment collateral relief.

### D. The Second Appeal

Petitioner again appealed to the Tenth Circuit, arguing this time that any action taken by a district court without subject-matter jurisdiction is void *ab initio* and subject to relief under Rule 60(b)(4). This was unanimously rejected. In its decision, the Tenth Circuit observed that a judgment is void for lack of subject-matter jurisdiction only when the entry of judgment is a plain usurpation of judicial power. *Id.* at 5a. Citing this Court's ruling in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), the panel noted that a federal court always has inherent authority to decide whether it has jurisdiction. Pet. App. 6a. The process of exercising that authority, the panel explained, may require the federal court to interpret a statutory grant of jurisdiction. But an error in interpretation does not render void the decision to exercise jurisdiction. Nor does it automatically void all decisions rendered while exercising jurisdiction based on that error. Pet. App. 5a-6a.

## REASONS FOR DENYING THE PETITION

The decision below correctly applied the well-settled principles established in *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938). It does not conflict with decisions of other courts of appeals, and does not present any issue that warrants further review by this Court. Petitioner's principal argument—that the Tenth Circuit's interpretation of 28 U.S.C. § 1332(a) con-

flicts with other circuits—is based on a misreading of the Tenth Circuit's decision.

The various conflicts suggested in the petition are in truth not conflicts at all. They are instead products of petitioner's misstatements of, and exaggerations about, the Tenth Circuit's decision and the holdings of other cases. The decision below was a straightforward interpretation of the inherent authority vested in federal courts to decide on a case-by-case basis whether they have subject-matter jurisdiction. It does not warrant this Court's certiorari jurisdiction and does not present any important new issues under Fed. R. Civ. P. 60(b)(4). The petition should be denied.

## ARGUMENT

### I. THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE PREVAILING INTERPRETATION OF COMPLETE DIVERSITY UNDER 28 U.S.C. § 1332(a)(2)

Petitioner argues that the Court's review is warranted because the Tenth Circuit's interpretation of 28 U.S.C. § 1332(a)(2) was influenced by a Seventh Circuit case, *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425 (7th Cir. 1993), which, according to petitioner, is in conflict with decisions of the Second, Fifth, Ninth, and District of Columbia Circuits. Petitioner misinterprets both *Allendale* and the Tenth Circuit's decision.

*Allendale* arose from a complicated, multi-party insurance coverage dispute involving foreign and domestic parties. On appeal from the district court's preliminary injunction, the Seventh Circuit considered whether the district court had subject-matter jurisdiction. *Id.* at 427. Finding citizens of states with diverse citizenship on both sides of the case, the Seventh Circuit found that the district court had subject-matter jurisdiction, but under 28 U.S.C. § 1332(a)(3), rather than § 1332(a)(2). In passing, the court commented briefly on the logic of how other circuits have interpreted §

1332(a)(2), but these comments had absolutely no bearing on the Seventh Circuit's analysis of the jurisdiction issue before it:

> The cases in which the statement [that United States citizens must be on both sides of an action between foreign citizens before a federal court may exercise diversity jurisdiction] appears are ones in which one side of the litigation had *only* foreign parties and the other had a mixture of foreign and domestic parties, so that the case did not fit any of the possibly applicable jurisdictional pigeonholes . . . . Exactly what sense this all makes rather eludes us. But we need not worry about the matter here. A case such as this, in which citizens of states are on both sides of the litigation . . . and are completely diverse, fits section 1332(a)(3) to a t.

*Allendale*, 10 F.3d at 428 (emphasis in original).

Viewed in proper context, these comments were mere *obiter dictum* ("we need not worry about the matter here") and were entirely unnecessary for the Seventh Circuit's decision. They certainly do not create a conflict between the circuits.

The Tenth Circuit also pointed out that an interpretation of § 1332(a)(2) was unnecessary to dispose of the issue petitioner had raised. Both respondents had conceded that under the prevailing interpretation of § 1332(a)(2) advocated by petitioner, complete diversity did not exist. The Tenth Circuit, therefore, did not decide whether § 1332(a)(2) provided a basis for subject-matter jurisdiction under the facts before the district court. It instead proceeded to the next step of its analysis and decided whether, assuming the district court did not have jurisdiction over the prior, terminated proceeding, the judgment of dismissal for *forum non conveniens* was void:

> While the circuits that have considered the issue read § 1332(a)(2) to require United States citizens on both sides of an action between foreign citizens, we concur with Judge Posner's observation that this interpretation is far from apparent from the face of § 1332(a)(2). Nevertheless, the Defendants assume for the sake of argument that the requirements of § 1332(a)(2) were not satisfied because Ms. Gschwind was not joined by a United States citizen. We make this same assumption inasmuch as the district court's views of jurisdiction are not dispositive to our analysis.

Pet. App. 4a-5a.

Having assumed that the district court lacked jurisdiction, the Tenth Circuit then considered whether the district court's assumed error was "a clear usurpation of power" rendering the judgment void, or merely an erroneous interpretation of a statutory grant of jurisdiction, which is not void. *Cf. Stoll v. Gottlieb*, 305 U.S. at 171. On this point, the appeals court charted a boundary between "usurpation" and "erroneous interpretation" by relying on *Nemaizer v. Baker*, 793 F.2d 58, 65 (1986), in which the Second Circuit had held that there must be "no arguable basis on which [the court] could have rested a finding that it had jurisdiction" before a judgment can be considered void. Pet. App. 6a. Citing the specific language the Ohio federal court used to conclude that the citizenship of the parties *was* completely diverse (a conclusion petitioner had undoubtedly helped prompt by stating in her motion to remand that complete diversity existed), the Tenth Circuit observed that the Ohio federal court had made a reasoned analysis of its statutory grant of diversity jurisdiction and simply came to a conclusion now assumed to be incorrect. *Id.* Then, citing the dicta in *Allendale* as a well-articulated *argument* for jurisdiction under like circumstances, the court concluded that there was at least an arguable basis for the district court's exercise of jurisdiction.

Petitioner surely makes too much of this, because neither court below based its disposition on an interpretation of the jurisdictional statute. Indeed, the Tenth Circuit expressly analyzed petitioner's collateral post-judgment motion to vacate on the premise that jurisdiction was lacking in the underlying case. In setting forth that premise, the Tenth Circuit *relied on* the prevailing interpretation of § 1332(a)(2) announced by the Second, Fifth, Ninth, and District of Columbia Circuits. Contrary to petitioner's contention, the Tenth Circuit did not reject that interpretation and did not create a circuit conflict.

## II. THE TENTH CIRCUIT'S DECISION DID NOT RESULT FROM THE COURT EXERCISING HYPOTHETICAL JURISDICTION AND IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *STEEL CO.*

Petitioner next suggests that the Tenth Circuit exercised hypothetical jurisdiction when it assumed that the district court lacked subject-matter jurisdiction over the case. She says this violates the Court's ruling in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Her argument, however, both misstates this Court's holding and misapplies it to the Tenth Circuit's decision.

As this Court recently explained, in *Steel Co.* "this Court adhered to the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). *Steel Co.* rejected the developing doctrine of "hypothetical jurisdiction" that allowed federal courts to defer ruling on challenges to jurisdiction "where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Steel Co.*, 523 U.S. at 93. The Court held that the requirement that jurisdiction be established as a threshold matter continues to be "inflexible and without exception." *Id.* at 94-95.

Nothing in the Tenth Circuit's decision is contrary to these holdings, nor did the Tenth Circuit extend "hypothetical jurisdiction," as that term has been defined in *Steel Co.* and *Ruhrgas*, to conduct its analysis. Unlike a court assuming subject-matter jurisdiction to get to the merits of a case without first deciding whether jurisdiction exists, here the Tenth Circuit assumed that the district court *lacked* subject-matter jurisdiction. And it did so not to decide the merits, but rather to decide whether the district court had an arguable basis for its alleged error in exercising jurisdiction—an error, it should be emphasized, that yielded a decision *not to exercise jurisdiction*.

Petitioner also argues that *Steel Co.* does not permit the Tenth Circuit to "hypothesize jurisdiction for purposes of determining whether the exercise of jurisdiction was void or voidable." Pet. 8. But she does not identify where in *Steel Co.* the Court extended its holding to her "void versus voidable" dichotomy. Nor does she explain how *Steel Co.* extends by analogy to such circumstances. Certainly petitioner cannot be heard to suggest that the Tenth Circuit's jurisdiction to hear her appeal was impermissibly "hypothetical," after she sought the district court's jurisdiction to consider her motion to vacate; after she invoked the Tenth Circuit's jurisdiction under § 1291 to review the district court's order denying her motion; and after she petitioned this Court to exercise its certiorari jurisdiction. Pet. 1.

## III. THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH OTHER APPELLATE DECISIONS CONCERNING CONDITIONS ON *FORUM NON CONVENIENS* DISMISSALS

Finally, there is no merit to petitioner's contention that the Tenth Circuit's decision creates an inter-circuit conflict with *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). To develop this argument, petitioner first posits that by denying her motion to vacate, the district court necessarily decided that it had not overstepped its judicial authority by im-

posing conditions on its dismissal for *forum non conveniens*. She then suggests that by affirming the district court's decision to deny the motion to vacate, the Tenth Circuit also affirmed and approved of the conditions imposed. Based on these highly uncertain premises, she cites a footnote in *In re Papandreou* in which the District of Columbia Circuit cautioned against imposing conditions on *forum non conveniens* dismissals. She concludes from all this that the Tenth Circuit's decision creates a conflict with *In re Papandreou* warranting the Court's review.

The flaws in petitioner's argument are obvious. First, when the district court found, in considering Petitioner's motion to vacate, that its judgment of dismissal was not a "clear usurpation of power," it did not differentiate between its power to order a dismissal for *forum non conveniens* and its power to order such a dismissal with conditions. Pet. App. 15a. Without a specific holding from the district court about the jurisdictional validity of the conditions, there is no basis to discern or assume the extent to which they figured in the Tenth Circuit's analysis. The Tenth Circuit's observation on which petitioner props up her argument ("[t]he district court also concluded that its exercise of jurisdiction was not an usurpation of authority, presumably because the defendant's residence was subject to a bona fide dispute"), Pet. App. 4a, hardly suggests that the conditions played any role in the court of appeals' analysis. The district court's conditions are not mentioned in the Tenth Circuit's holding, nor are they identified as being a reason for, or a factor in, the holding. Pet. App. 6a-7a.

Petitioner fares little better developing the other side of the supposed inter-circuit conflict. *In re Papandreou* arose from an action brought by a foreign corporation and its sole shareholder against a Greek government minister and Greek governmental entities for breach of a license to operate a casino in Athens. 139 F.3d at 249. The defendants raised several defenses to the complaint, among them *forum non conveniens* and a jurisdictional bar under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. *See*

139 F.3d at 249. The plaintiff sought discovery aimed at testing the FSIA defense. *Id.* In response, the defendants sought a writ of mandamus to vacate a district court discovery order authorizing a deposition of the Greek minister. The thrust of the opinion, therefore, is the appropriateness of taking the depositions of cabinet-level governmental officials, not conditions imposed on *forum non conveniens* dismissals.

*In re Papandreou* briefly discussed *forum non conveniens* and includes the comment in footnote 6 quoted by petitioner. The District of Columbia Circuit did so, however, only as part of a larger effort to consider, at the defendants' urging, the alternative grounds for dismissal before evaluating the FSIA claim on which the discovery order was based. *Id.* at 254. The appeals court made plain that its discussion of *forum non conveniens* bore no impact on its decision to grant the writ of mandamus and vacate the discovery order:

> Of course we express no opinion on the merits of these alternative defenses, nor on whether determining them in advance of FSIA immunity would impose a lesser expected burden on the defendants in this case. Those matters are for the district court to determine in the first instance.

*Id.* at 256.

The District of Columbia Circuit's comments on *forum non conveniens* were unnecessary for its decision on the writ of mandamus. They are *obiter dictum* which, juxtaposed against the Tenth Circuit's silence on the conditions the district court attached to its judgment of dismissal, cannot reasonably be said to rise to the level of a conflict between the two circuits.

Two final thoughts bear considering. First, the imposition of conditions on the district court's dismissal was an issue that would have been more properly addressed the first time the case was appealed to the Tenth Circuit. The issue

bears more on whether the dismissal for *forum non conveniens* was correct than on the issue now before the Court – *i.e.*, whether the prior judgment is subject to collateral attack as void for lack of jurisdiction. Second, the conditions were imposed against the respondents to assure that petitioner had an adequate alternative forum in France in which to pursue her claims. The conditions did not prejudice her in any way. Her present argument – that conditions crafted by the district court to protect her interests create a conflict between the circuits – undercut the credibility of her entire petition.

## IV. THIS CASE DOES NOT WARRANT FURTHER REVIEW BY COURTS IN THE UNITED STATES

The petition offers no practical reason for the Court to grant certiorari, nor does one suggest itself from considering the protracted history of this case. Three different federal courts have devoted nearly six years to deciding *where* it should be litigated. The Court should not require that it be remanded now, wasting years of judicial effort, and imposing unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836-37 (1989).

These considerations apply with particular force here because granting certiorari would have little or no effect on the ultimate outcome on where the case will be litigated. Were certiorari granted and the Tenth Circuit's decision reversed or vacated, the case would return to the Court of Common Pleas in Ohio. There, the respondents would renew their motion to dismiss for *forum non conveniens*. Under established Ohio law, the result would be the same as currently exists in federal court. The Ohio Supreme Court has recognized the doctrine of *forum non conveniens*, adopting the legal principles and standards established here in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Chambers v. Merrell-Dow Pharms., Inc.*, 519 N.E.2d 370 (Ohio 1988). Its statement of the purpose of *forum non conveniens* and the

standards applicable to considering motions based on it, are entirely consistent with this Court's decisions. *Id.* at 373.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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